FILE COPY

Supreme Court, U.S.
FILED
MAR 27 1970
JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1357

FRANK LINDSEY,
*Petitioner,*

vs.

STATE OF NEW MEXICO,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

W. PETER MCATEE
E. DOUGLAS LATIMER
MCATEE, MARCHIONDO & MICHAEL
*Attorneys for Petitioner*
P. O. Box 568
Albuquerque, New Mexico 87103

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

BLEED THROUGH POOR COPY

## INDEX

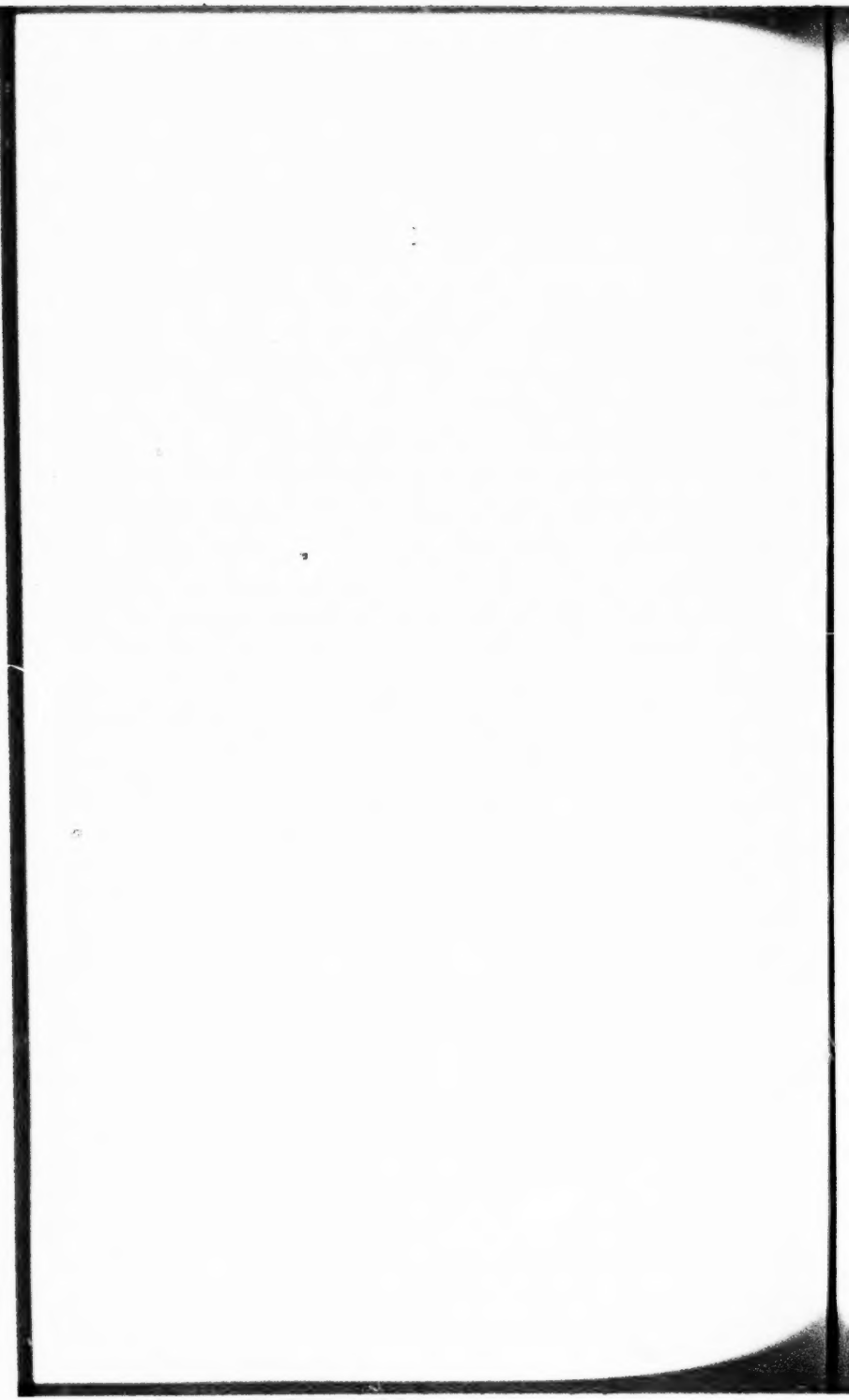

Grounds for Jurisdiction ..... 2
A. Opinion Below ..... 2
B. Rehearings ..... 2
C. Jurisdiction ..... 2
Question Presented ..... 2
Constitutional Provisions and Statutes Involved ..... 4
Statement of Case ..... 5
Reasons for Granting the Writ ..... 8
Conclusion ..... 18
Appendix—Opinion, Court of Appeals of the State of New Mexico ..... A1


### Table of Cases


*Gregg Dyeing Company* v. *Query*, 286 U.S. 472, 52 S. Ct. 631, 76 L. Ed. 1232, 84 A.L.R. 831 ..... 17
*Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602 ..... 17
*U. S.* v. *Jackson*, 390 U.S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209 (1968) ..... 3, 8, 9, 11, 14, 15, 16, 17


### Constitutional Provisions and Statutes


Constitution of the United States—
Amendment V ..... 3, 4, 8, 12
Amendment VI ..... 3, 4, 8, 12, 16
Amendment XIV ..... 3, 4, 8, 12
Section 20-2-3, N.M.S.A. 1953 ..... 2, 5, 10



BLEED THROUGH POOR COPY

IN THE

# SUPREME COURT OF THE UNITED STATES

---

OCTOBER TERM, 1969

---

No. .....

---

FRANK LINDSEY,
*Petitioner,*

vs.

STATE OF NEW MEXICO,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New Mexico entered in the above case on December 5, 1969.

## GROUNDS FOR JURISDICTION

### A. Opinion Below

The opinion of the Court of Appeals of the State of New Mexico is appended to this Petition; the opinion sought to be reviewed is the decision entered on December 5, 1969.

### B. Rehearings

An Order denying a timely Motion for Rehearing was entered on December 30, 1969.

### C. Jurisdiction

The judgment of the Court of Appeals of the State of New Mexico was made and entered on December 5, 1969 and an Order denying Motion for Rehearing entered on December 30, 1969. The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1257(3).

## QUESTION PRESENTED

Mr. Frank S. Lindsey, petitioner herein, was indicted and tried for the crime of receiving and concealing stolen property, knowing the same to have been stolen. Mr. Lindsey, through his attorneys, and prior to trial, filed a motion to suppress any evidence of his prior criminal convictions, contending that such evidence was irrelevant, prejudicial and that introduction of such evidence was contrary to the due process requirements of the United States Constitution and the Constitution of the State of New Mexico and, further, that §20-2-3, N.M.S.A. (1953 Comp.) allowing proof of prior criminal convictions through cross-examination of a defendant who takes the witness stand was unconstitutional as applied to Mr. Lindsey. He further contended that this statute operated to deny him his

BLEED THROUGH POOR COPY

right to due process and his right to take the witness stand in defense of the case presented against him, particularly stating that evidence of any prior conviction was remote in time, place and event and calculated strictly to inflame and prejudice the jury. He further contended that the operation of this statute tended to force him to decline to take the witness stand and that, by virtue of this fact alone, it was contrary to due process requirements of the United States Constitution.

Upon presentation of that motion to the trial judge, the judge ruled that he *could not* suppress such evidence.

The question presented for review is:

Whether a statute, which allows the prosecutor in a criminal case to establish the fact of a prior criminal conviction or convictions of a defendant through cross-examination, without any regard to relevancy or remoteness in time which tends to coerce a defendant with a record of prior criminal convictions to decline to take the witness stand in order to avoid obvious and inevitable prejudice, places an impermissible burden upon that defendant's exercise of his rights under the Fifth, Sixth and Fourteenth Amendments and is, therefore, unconstitutional by virtue of the rule announced in the case of *U. S.* v. *Jackson*, 390 U.S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209 (1968).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

"AMENDMENTS
to the
CONSTITUTION
OF THE UNITED STATES

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

### AMENDMENT XIV

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

BLEED THROUGH POOR COPY

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"NEW MEXICO
STATUTES
1953
ANNOTATED
VOLUME 4
CHAPTER 20
ARTICLE 2

§20-2-3. Proof of witness's conviction of crime.—A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction; and a certificate, the substance and effect only, omitting the formal part, of the indictment and conviction for such offense, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court at which the offender was convicted, or by the deputy of such clerk or officer under the seal of said court, shall, upon proof of the identity of the witness, as such convict, be sufficient evidence of his conviction."

## STATEMENT OF CASE

The petitioner, Frank Lindsey, was indicted for violating §40-A-16-11, N.M.S.A., 1953 Comp. (Replacement Volume 6), a crime commonly called receiving and concealing stolen property. (R. 10) He was tried on November 13, 1968 and convicted of that crime and subsequently his appeal was taken; the conviction was affirmed by the

opinion of the Court of Appeals for the State of New Mexico handed down on December 5, 1969. (R. 376-389)

Prior to trial, on October 24, 1968, defendant's attorneys filed in his behalf a motion seeking to suppress any evidence of prior criminal convictions contending that that section of the New Mexico Statutes Annotated, being §20-2-3, allowing cross-examination of a criminal defendant concerning prior convictions as a matter of course, was unconstitutional as it would apply to defendant, Frank Lindsey, and further contending that any prior conviction of defendant was remote in time, place and event and that it could only operate to inflame the minds of the jurors and prejudice them against his cause and, further, that this operated to violate his rights to take the witness stand in defense of the case. (R. 28-29) Upon oral argument of this motion to the trial court, counsel for defendant stated the following:

> "Mr. Beaty: We have moved that all evidence of prior criminal convictions be suppressed in this trial because they are remote in time and are not of the same nature of the offense charged.
>
> The Court: Let us see what they are.
>
> Mr. Beaty: Plus the fact - - -
>
> The Court: I can't do that. They are entitled to use this information for the purpose of impeachment, and not to prove that he committed this crime, but it goes to his character, I suppose, and credibility. Can't do that. Once they put him on the stand, they can't." (R. 63-64)

On appeal, counsel for Mr. Lindsey raised the question of the constitutionality of this action:

> "Defendant was compelled to abstain from taking the witness stand and giving evidence in his own behalf which would have explained the possession of the

> **television set and barred a conviction, therefore, defendant's right under the Fifth, Sixth Amendments and the due process clause of the Fourteenth Amendment were violated." (R. 342)**

Subsequently, in Appellant's Brief-in-Chief, it was argued that the New Mexico Statute (§20-2-3), in the context in which it was applied to this defendant and by virtue of the manner in which the court ruled, was unconstitutional because it tended to coerce this defendant, as it would any defendant, to elect to remain silent rather than take the witness stand with the certain knowledge that inflammatory, irrelevant and highly prejudicial evidence would be introduced through the guise and vehicle of cross-examination. This argument can be found at pages 39 through 43 of Appellant's Brief-in-Chief. (R. 344-348) It was contended by appellant in Appellant's Reply Brief that, in light of the court's language in ruling upon defendant's motion to suppress prior criminal convictions, the court was of the opinion that it could not suppress such evidence since the statute allowed it; further the fact that the trial judge refused to suppress that evidence tended to coerce the defendant to decline to take the witness stand and that such coercion came within the contemplation and prohibition of the *Jackson* decision. (R. 371-372)

The Court of Appeals, in addressing itself to the argument of counsel concerning the unconstitutionality of §20-2-3, N.M.S.A. 1953, as it was applied to this defendant, in light of the *Jackson* case and language therein, declared:

> "The result in that case has no bearing on the question now before us.
>
> We concede an accused may hesitate to take the stand if his past criminal record is such that his credibility will probably be completely destroyed in the eyes of the jury if this record is made known to the jury, how-

ever, this in no way impairs his right against self-incrimination, his right not to be deprived of his life, liberty or property without due process of law, nor his right to a public trial by an impartial jury.

When an accused takes the witness stand he is in the same position as any other witness. §22-2-3, supra." (Opinion, A14-A15)

The Court continued and stated that, pursuant to that section of the statute, the Supreme Court of the State of New Mexico had repeatedly held that prosecution may establish through the accused the fact of prior convictions and the name of the particular felony or misdemeanor of which he had been convicted. (R. 388)

## REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals of the State of New Mexico should be reviewed by this Court because it upholds a statute and procedure pursuant to that statute which places an impermissible burden upon a defendant's exercise of his right to take the witness stand and give evidence in his defense. The language of the decision of the Court of Appeals of the State of New Mexico, in light of the statute which that decision construed, and the practice recognized by the language of the Court in its decision, tends to unduly restrict a criminal defendant's rights under the Fifth, Sixth and Fourteenth Amendments, when viewed in light of the rule and reasoning in the case of *U. S.* v. *Jackson, supra.*

As was declared by the Court of Appeals, it has long been the rule in New Mexico that the prosecution may establish the fact of prior criminal convictions of a defendant in the event that he chooses to take the witness stand. (R. 388) There is no logic, no reason, and no proper foundation in any rules of jurisprudence for the rule as announced

BLEED THROUGH POOR COPY

by the Court of Appeals of the State of New Mexico that the prosecutor in a criminal case has the right to establish through a criminal defendant, in the event that he takes the witness stand, evidence of his prior criminal record without regard to materiality or relevancy. The obvious basis of this rule is found in the long standing axiom that any witness who takes the stand puts his credibility in issue. But to crystallize that rule in the form of a statute and thereby establish a rule that a trial judge *"can't"* suppress evidence of prior criminal conviction under any circumstances in the event that a criminal defendant takes the witness stand is not within the actual contemplation of the old Hornbook rule. By virtue of the manner in which that statute has operated in New Mexico, as recognized by the Court of Appeals in its ruling, and by virtue of the fact of the manner in which it operated as against this petitioner and certainly countless numbers of other criminal defendants, it cannot be allowed to stand in light of the rule announced in *U. S.* v. *Jackson, supra.*

Petitioner concedes that there are many decisions, both state and federal, which declare that a trial court *may* allow a criminal defendant to be cross-examined concerning his prior criminal convictions. However, all of those decisions were prior to or failed to consider the decision and the rule and language of *U. S.* v. *Jackson, supra.* And, in any event, the proper rule should be phrased as above, that is: a trial court *may* allow such proof as distinguished from the rule that a trial court *must* allow such proof.

Defendant sought to suppress any introduction of evidence of prior criminal conviction by filing a Motion which contended that the statute allowing such introduction on cross-examination was unconstitutional as it applied to him. (R. 27-28) And upon hearing this Motion, and before counsel for defendant was able to state all the grounds upon which the motion was presented the court declared:

> "The Court: I *can't* do that. They are *entitled* to use this information [record of prior convictions] for the purpose of impeachment, and not to prove that he committed this crime, but it goes to his character, I suppose, and credibility. Can't do that. Once they put him on the stand, they can't." (R. 64) (Emphasis ours)

Thus the Court declared in its own words that it *could not* suppress evidence of prior criminal convictions; that the prosecution was *entitled* to use such evidence. The Court was quite emphatic in stating that it could not and nowhere did the Court give any evidence that it was of the impression that it had the discretion to decide whether or not to allow or disallow introduction of such evidence. This must be viewed in the particular light of the statute authorizing such cross-examination and introduction of evidence, which petitioner attacked in his motion as being unconstitutional, which states, in part:

> "§20-2-3. Proof of witness's conviction of crime.—A witness may be questioned as to whether or not he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, *the opposite party may prove such conviction;* . . ." (N.M.S.A. 1953, §20-2-3) (Emphasis ours)

The wording of the statute gives the attorney who proposes to cross-examine a "witness" the opportunity of establishing the fact of a "witness' " conviction of any felony or misdemeanor. There is nothing in the statute which purports to or appears to give a court discretion as to whether or not such evidence may, in fact, be suppressed or admitted. On the contrary, the statute purports to give an "opposite party" the *right* to establish the fact of any such conviction.

BEST THROUGH POOR COPY

In view of the language used by the Court in ruling upon defendant's Motion to suppress any evidence of prior criminal convictions, it is clear that the Court was construing the statute as shown here, to-wit: That an opposite party had the right to introduce such evidence and that a trial court *cannot* suppress such evidence.

The Court of Appeals addressed itself to this argument and declared that there was no denial of due process in light of the *Jackson* decision, nor was there a denial of right to a fair and impartial jury trial by the Court's ruling allowing such evidence to be introduced. (R. 387-388)

In so ruling, the Court of Appeals declared:

> "When an accused takes the witness stand he is in the same position as any other witness. §20-2-3, supra. He is not entitled to have his testimony falsely cloaked with reliability by having his credibility protected against the truth searching process of cross-examination. . . . Certainly any attack on an accused's credibility by a searching cross-examination may have some deterring effect upon his willingness to waive his right against self-incrimination and to take the witness stand." (R. 388)

The Court continued by stating that the Supreme Court of the State of New Mexico had repeatedly declared that the state may establish through the accused the fact of any prior conviction and the name of the particular crime of which he had been convicted. (R. 388)

It is respectfully contended herein that a defendant in a criminal action is not in the same position as any other witness. While it is generally true that he may be subject to cross-examination which would tend to impeach his credibility, as a criminal defendant, his position is considerably more sensitive than that of "any other witness" and rules

have been established to safeguard against prejudice to a defendant.

However, it is the contention of this petitioner that a statute which allows a prosecutor to establish through a criminal defendant the fact of his prior criminal convictions as a matter of course and right, without any control or qualifying condition upon which a trial court judge may rule which would allow that trial court judge to restrict cross-examination concerning prior criminal convictions when they are determined to be absolutely irrelevant and prejudicial, is contrary to a defendant's rights as guaranteed by the Fifth Amendment due process guaranty, Sixth Amendment rights to a fair and impartial jury trial, and the Fourteenth Amendment due process requirements. Such a statute operates to force a criminal defendant with prior criminal convictions to abstain from offering his own testimony in his defense.

As a practical matter, and probably in most instances, cross-examination of a criminal defendant concerning prior convictions, can operate only to inflame the minds of the jurors and prejudice them against the defendant. This evidence must tend to cause jurors to decide the case *not* upon the facts presented, which may or may not show the defendant guilty of the particular crime of which he is accused, but upon improper inferences which tend to show the defendant is a "bad person". To allow introduction of evidence which tends to establish that a defendant is a "bad person", when that same evidence does not necessarily have any probative value as to the guilt or innocence of the accused, and which cannot fairly have any probative value as to the defendant's credibility concerning the issues to which he is testifying, can have one inevitable effect; that effect is confusion of the jurors which operates to cause them to decide the innocence or guilt of the accused not upon rele-

BLEED THROUGH POOR COPY

vant facts and evidence, but upon shadows cast upon the character of the defendant by virtue of prior criminal convictions.

The certain knowledge of a defendant and a defendant's attorneys of the inevitable damaging effect and prejudicial nature of such cross-examination has in this instance, as it must in many instances, caused the defendant to decline to take the stand, not because of a fear of self-incrimination upon facts properly in issue, but because of the fear of a guilty verdict based upon evidence of prior criminal convictions which could only be introduced through the vehicle of the defendant himself in the event that he becomes a witness.

It was clear that Mr. Lindsey's attorneys were cognizant of the potential problem of evidence of prior criminal convictions in the early stages of the proceeding. It was for this reason, of course, that the defendant's Motion to suppress such criminal conviction was filed well in advance of trial. The logical inference raised from the record and which is here again asserted, is that had the defendant been successful in suppressing evidence of prior criminal convictions, he would undoubtedly have taken the stand. However, his motion failed, as it must have by virtue of the statute.

The record shows that the defendant did not take the stand. Implicit in this record and in the defendant's failure to take the stand, is the fact that because he knew that if he took the stand his prior criminal record would be introduced into the record, he of necessity elected to attempt to establish his defense through other witnesses and declined to take the stand and give whatever evidence or testimony he could in his own defense. The operation of the statute and the ruling of the trial court judge pursuant

to that statute, as a practical matter, forced the defendant to decline to take the stand.

When presented with this contention on appeal, the Court of Appeals stated:

> "We concede an accused may hesitate to take the witness stand if his past criminal record is such that his credibility will probably be completely destroyed in the eyes of the jury if this record is made known to the jury." (R. 387-388)
>
> And further an . . . "Attack on an accused's credibility by a searching cross-examination may have some deterring effect upon his willingness . . . to take the witness stand." (R. 388)

When faced with the argument that *U. S.* v. *Jackson, supra,* prohibited a statute of this nature, which tended to coerce a criminal defendant to forego any of his constitutional rights, the Court ruled that the result in the *Jackson* case had no bearing on the question presented to them. (R. 387)

It is respectfully contended that the language, reasoning and purpose of the *Jackson* decision directly applies to statutes such as the one which this petitioner contends is improper. In the *Jackson* case this Court stated with reference to the Federal Kidnapping Act:

> "Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provisions is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. *If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who*

BLEED THROUGH, POOR COPY

*choose to exercise them, then it would be patently unconstitutional."* (*U. S. v. Jackson, supra*) (Emphasis ours)

This Court continued and stated that although Congress no doubt had the power to impose the death penalty for violation of the Federal Kidnapping Act, that it could not impose a penalty in a manner that ". . . needlessly penalizes the assertion of a constitutional right." (*U. S. v. Jackson, supra,* p. 583). This Court declared that the fact that the Federal Kidnapping Act tended to encourage a guilty plea which meant that a criminal declined to insist upon his rights under the Fifth and Sixth Amendments to a jury trial and right not to plead guilty, rendered the clause of the Act establishing the right of the jury to set the death penalty fatally defective under the Constitution.

This reasoning and rule applies directly to the situation which confronted Mr. Lindsey at the time his Motion to suppress was filed. While a defendant who offers himself as a witness might properly be impeached by cross-examination, which calls his veracity into question, a statute which establishes the automatic right of a prosecutor to introduce irrelevant, incompetent and immaterial evidence in the event that a defendant takes the stand, falls directly within the prohibition of *Jackson.* Admissibility of impeachment evidence should be within the sound discretion of a trial judge. This statute removed that discretion as shown by the language of the trial judge when he ruled.

The right of a defendant to present evidence in his own behalf and to have a jury decide his innocence or guilt upon relevant facts and evidence, is no less important than a defendant's right to a jury trial under the Federal Kidnapping Act. Similarly, the right to a jury which has not been prejudiced by improper and irrelevant evidence

should enjoy equal stature under the Sixth Amendment. This petitioner was forced to decline to take the stand because of the obvious inevitable prejudicial effect of evidence of his prior criminal record. The situation and Court's ruling coerced and encouraged him not to take the stand and to elect to attempt to establish his defense through other means rather than have the jury consider matters which could only tend to prejudice and confuse the issues.

It can no doubt be argued that the statute construed most favorably in certain instances would allow relevant information on cross-examination of a defendant concerning prior criminal convictions which might tend to show his propensity to commit the act of which he is accused. However, this is not what the language of the statute purports to allow, nor is that reflected by the language of the trial court or the decision of the Court of Appeals. The statute allows a party to establish through a witness the fact of his prior criminal convictions, with no restriction whatsoever thereon.

As stated by this Court in the *Jackson* decision:

> "It is one thing to fill a minor gap in a statute—to extrapolate from its general designed details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and complete novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." (p. 580)

It would be far better to have no statute at all and to allow trial court to make its decision in each separate instance based upon relevancy and materiality and the propriety of impeachment than to have a statute which allowed a party to establish the fact of a witness' conviction automatically when that witness is a criminal defendant just as if he were any other witness.

BLEED THROUGH POOR COPY

It has long been the rule of this Court that when a federal constitutional right is asserted with reference to a state statute, this Court looks to the operation of that statute as it applied to that party and not upon any hypothetical characterization by a state court. (See *Gregg Dyeing Company* v. *Query*, 286 U.S. 472, 52 S. Ct. 631, 76 L. Ed. 1232, 84 A.L.R. 831) In this instance, however, even the construction given by the Court shows that the statute operates contrary to and in contravention of this petitioner's rights as aforementioned. The statute has set up a rule which has operated to effectively abrogate this petitioner's constitutional rights and as such the *Jackson* decision declares that that statute must fall. Further:

> "Where rights secured by the Constitution are involved there can be no rule making or legislation which would abrogate them." (*Miranda* v. *Arizona*, 384 U.S. 436, 491, 86 S. Ct. 1602, 1636)

Assuming for a moment that no statute such as the one above complained of existed, what would the result be? In every instance in which this question concerning the propriety of introduction of evidence of prior criminal convictions for purpose of impeachment of a criminal defendant who offers himself as a witness is concerned, the trial court would, of necessity, rule on that point of admissibility as a trial court does on any other proffered evidence. He would hopefully exercise his discretion and decide whether or not that particular evidence was proper for purposes of impeachment under the circumstances of the case and would not be bound by a rule which "*entitled*" a prosecutor to automatically introduce such evidence. A trial court judge would no longer be in a position where he *could not* suppress such evidence if he deemed it proper.

## CONCLUSION

For the above enumerated reasons, this Court should grant the Writ of Certiorari sought herein.

Respectfully submitted,

McAtee, Marchiondo & Michael
*Attorneys for Petitioner*
P. O. Box 568
Albuquerque, New Mexico 87103

E. Douglas Latimer

W. Peter McAtee

FILTER THROUGH POOR COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 352

STATE OF NEW MEXICO,
Plaintiff-Appellee,

vs.

FRANK LINDSEY,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
McMANUS, JR., JUDGE

JAMES A. MALONEY, Attorney General
RAY SHOLLENBARGER, Asst. Atty. Gen.
MARK B. THOMPSON III, Asst. Atty. Gen.
Attorneys for Appellee
E. DOUGLAS LATIMER
McATEE, MARCHIONDO & MICHAEL
Albuquerque, New Mexico
Attorneys for Appellant

**OPINION**

OMAN, Judge.

Defendant appeals from his conviction of Receiving Stolen Property, contrary to § 40A-16-11, N.M.S.A. 1953 (Repl. Vol. 6). The points relied upon for reversal are considered in their order of presentation in the brief in chief.

Defendant's first contention is that the trial court erred in denying his motion for change of venue. Very shortly after the commencement of the trial and before proceeding to select the jury, defendant orally moved for a mis-

trial ". . . due to the publicity given this case, particularly the publicity of yesterday, . . ."

The newspaper offered and received by the court in support of the motion contained an article entitled "Judge Rejects Move to Again Postpone Trial." The article relates to the denial of defendant's motion for postponement; the granting of a motion to limit the trial ". . . to a single incident involving a television set"; a statement by the Assistant District Attorney that ". . . he planned to use other alleged incidents to show Lindsey knew the television set was stolen"; the penalty for ". . . receiving and concealing stolen property worth more than $100 . . ."; a ruling by the court that ". . . the prosecution will not have to show how the television set was obtained"; and that no ruling was asked at that time by defendant's attorney ". . . on a motion to suppress statements Lindsey made to policeman Timothy Kline."

We are unable to find in this article anything which was prejudicial to defendant or which could have aroused public excitement or feeling against him. It is neither suggested nor argued that any of the jurors who tried the case had read the article. Under these circumstances, defendant could not have been prejudiced. See Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969). Compare State v. Thayer, 80 N.M. ....., 458 P.2d 831 (1969).

The other articles to which defendant may have had reference in his motion are not before us, and we cannot speculate as to the contents thereof or the effect they may have had upon the inhabitants of Bernalillo County from which the jury was selected.

Defendant contends he ". . . raised the issue in the only manner which was available to him under the time and circumstances of the case. . . ." and that the decisions in State v. Shawan, 77 N.M. 354, 423 P.2d 39 (1967); State

BLEED THROUGH POOR COPY

v. Alaniz, 55 N.M. 312, 232 P.2d 982 (1951); State v. Montoya, 80 NM. 64, 451 P.2d 557 (Ct. App. 1968), and State v. Childers, 78 N.M. 355, 431 P.2d 497 (Ct. App. 1967), required the trial court to grant the motion or hear evidence thereon.

We are not convinced the motion was presented in the only manner available under the circumstances, and the cases relied upon by defendant do not support his position. The Montoya, Childers and Alaniz cases, insofar as here material, were concerned with the effect of a timely filed motion which complied with the provisions of § 21-5-3, N.M.S.A. 1953, or the amended version thereof, which appears as § 21-5-3, N.M.S.A. 1953 (Supp. 1699). As held in these cases, if a motion for change of venue in proper form and properly supported is timely filed, as required by § 21-5-3, supra, the trial judge must either grant the motion or conduct a hearing thereon as provided in § 21-5-4, N.M. S.A. 1953. See also, Deats v. State, supra. However, here we have an oral motion which in no way met the statutory requirements as to timeliness, form or substance.

In State v. Shawan, supra, the motion was not filed until the morning of trial, but was in proper form and otherwise complied with the requirements of § 21-5-3, supra. The motion could not have been filed sooner due to the time of the publication, which allegedly resulted in defendant's inability to obtain a fair trial in the county. The publication relied on was incorporated into the motion and was a part of the record on appeal. The defendant in that case also offered to produce witnesses to establish that substantially the same story had been broadcast by radio in the area on the day before trial. Under these circumstances, our Supreme Court held the trial court erred in summarily denying the motion.

Defendant next contends the trial court erred in refusing to quash the indictment. Defendant was indicted

for receiving stolen property contrary to § 40A-16-11, supra, which, insofar as here material, defines the offense as follows:

> "Receiving stolen property consists of buying, procuring, receiving or concealing anything of value, knowing the same to have been stolen or acquired by fraud or embezzlement."

The indictment charged defendant with receiving and concealing stolen property contrary to the provisions of § 40A-16-11, supra, and further charged that:

> "On diverse dates between March 20, 1965, and the 19th day of March, 1968, . . . [the defendant] did buy, procure, receive, or conceal things of value knowing the same to have been stolen or acquired by fraud or embezzlement, . . ."

On May 31, 1968, defendant filed a Motion for Bill of Particulars by which he sought an order requiring the District Attorney to give each particular date between March 20, 1965, and March 19, 1968, on which defendant allegedly committed the charged offense, and a specification of ". . . the merchandise that the Defendant on each specific date did buy, procure, receive or conceal . . ."

On the same date defendant filed a Motion to Quash Indictment on the grounds:

> "1. That the same does not charge an offense under the laws of the State of New Mexico.
>
> "2. That the same is too general, vague and indefinite.
>
> "3. That the same attempts to charge more than one offense although it does not charge an offense."

The indictment is in substantially the form prescribed by statute, and, insofar as form is concerned, no greater

BLEED THROUGH POOR COPY

degree of conformity is required. Section 41-6-5, N.M.S.A. 1953 (Repl. Vol. 6).

The offense was charged in the name given it by the statute; it was stated in almost the identical language of the statutory definition thereof, and certainly in terms of substantially the same meaning; and express reference was made to the statute creating the offense. The statutes require only that the offense be charged in any one of these ways. Section 41-6-7, N.M.S.A. 1953 (Repl. Vol. 6).

Pursuant to the orders and directions of the trial court, the State filed a Bill of Particulars setting forth that "On or about . . ." six stated dates the defendant received certain specified articles of property. One of these dates was October 1, 1966, and the article of property allegedly received by defendant on or about that date was a "portable General Electric 12 inch Black and White Television, Serial No. P 204547 Model No. T R 814 C E B."

Defendant subsequently filed a motion to require the State to elect on which of these alleged six offenses it would prosecute defendant. On the morning of trial, as the very first order of business, the following occurred:

> "MR. BEATY [defendant's attorney]: Your Honor, the first motion we bring to your attention this morning is to order the State to elect on which offense it will prosecute, and Mr. Wilson [an Assistant District Attorney] had agreed with me that we would take up only one. That's the incident involving a television set. Is that right?
>
> "MR. WILSON: That's correct. The defendant will be—he is charged with receiving and concealing a twelve-inch G.E. portable television belonging to Sam Boren, knowing same to have been stolen.
>
> "THE COURT: That's the offense you're trying him on?
>
> "MR. WILSON: That's correct."

Nothing further was said concerning this particular matter. Defendant was then tried and convicted of receiving the television set knowing the same to have been stolen or acquired by fraud or embezzlement.

By the indictment defendant was advised of the name and nature of the offense and cited to the section of the statutes under which he was charged. By the Bill of Particulars he was informed as to the time of the alleged commission of the offense and the particular property involved. The indictment and bill of particulars are to be read as a single instrument constituting the accusation, and are to be so considered in determining the adequacy of the indictment. Norton v. Reese, 76 N.M. 602, 417 P.2d 205 (1966); State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936); State v. Putman, 78 N.M. 552, 434 P.2d 77 (Ct. App. 1967). See also, State v. Selgado, 78 N.M. 165, 429 P.2d 363 (1967); State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945); §§ 41-6-7, 8, 11 and 15, N.M.S.A. 1953 (Repl. Vol. 6). By agreement with the Assistant District Attorney, defendant was tried only on one of the offenses with which he had properly been charged.

Defendant next contends the trial court erred in denying his motions for dismissal and a directed verdict on the ground that there was no evidence upon which the jury could have found he had knowledge that the television set was stolen.

The evidence shows defendant had the television set in his possession; he acquired this possession within a few days of the theft thereof; the fair market value of the set was $120.00 and defendant sold it for $65.00; he was constantly selling a variety of new articles for about one-half their retail price; there was no evidence of his connection with any lawful business in which such articles were sold; he took orders for some of the articles which he subse-

FILMED THROUGH POOR COPY

quently sold; some of these articles had "price stickers" on them, and these "price stickers" resembled those used by stores engaged in the sale of such articles; and defendant told an undercover police officer that everything he sold was stolen.

We are of the opinion that from this evidence the jury could reasonably find defendant knew the television set had been stolen. This is unlike the case of State v. Follis, 67 N.M. 222, 354 P.2d 521 (1960), wherein the court held ". . . that the mere possession of recently stolen property is not sufficient in and of itself to warrant the conviction of a defendant on a charge of having stolen property in his possession, . . ." We do not consider that the decision in State v. Campos, 79 N.M. 611, 447 P.2d 20 (1968), requires us to reverse, as urged by defendant.

Unless a defendant admits knowledge of the fact that goods he has received are stolen, this knowledge of necessity must be established by circumstantial evidence. In our opinion, the evidence here is clearly sufficient to support a finding of knowledge on the part of defendant, and is incompatible with the innocence of defendant on any rational theory. It is true defendant's wife testified that a friend of hers gave her a television set which looked like the one in question, but she was unable or unwilling to say the set given her was definitely the set in question. In any event, the jury was not required to accept this suggested source of acquisition by defendant of the set and disregard the evidence concerning the theft of the set and all the above outlined evidence which supports a finding of knowledge by defendant that the set was stolen. It was for the jury to weigh the evidence and pass on the credibility of the witness. State v. Hudson, 78 N.M. 228, 430 P.2d 386 (1967); State v. McAfee, 78 N.M. 108, 428 P.2d 647 (1967).

The next contention of defendant is that the trial court erred in admitting evidence of other stolen property.

Ordinarily evidence of offenses other than and independent of the offense with which the accused is charged and for which he is being tried is not admissible. State v. Velarde, 67 N.M. 224, 354 P.2d 522 (1960); State v. Lord, 42 N.M. 638, 84 P.2d 80 (1938); State v. Bassett, 26 N.M. 476, 194 P.2d 867 (1921); State v. Mason, 79 N.M. 663, 448 P.2d 175 (Ct. App. 1968); 1 Anderson, Wharton's Criminal Evidence §§ 233-244 (12th Ed. 1955); 1 Herrick, Underhill's Criminal Evidence § 205 (5th Ed. 1956).

There are, however, distinct exceptions to this general rule. State v. Velarde, supra; State v. Lord, supra; State v. Bassett, supra; State v. Mason, supra; 1 Anderson, Wharton's Criminal Evidence, supra; 1 Herrick, Underhill's Criminal Evidence, supra, §§ 206-212. One of these exceptions is that of proof of knowledge. State v. Mason, supra; 1 Herrick, Underhill's Criminal Evidence, supra, § 208; 1 Anderson, Wharton's Criminal Evidence, supra, § 236. This exception is especially applicable to the offense of receiving stolen property, since guilty knowledge is the gist or substance of the offense. 1 Anderson, Wharton's Criminal Evidence, supra, § 236 at 516; Annot., 105 A.L.R. 1288 (1936); Franklin v. State, 100 Ga.App. 667, 112 S.E.2d 214 (1959); Smeltzer v. State, 243 Ind. 437, 185 N.E.2d 428 (1962); Lanier v. State, 172 Tex. Crim. 238, 356 S.W.2d 671 (1962).

As shown above, one of defendant's contentions in the trial court and on this appeal was that there was insufficient evidence to show he had the requisite guilty knowledge. As above stated, unless a defendant admits knowledge of the fact that the goods he has received are stolen, this knowledge of necessity must be established by circum-

FILMED THROUGH POOR COPY

stantial evidence. Often the only way this can be accomplished is by evidence of other similar offenses.

Defendant next contends the Assistant District Attorney made improper comments upon defendant's exercise of his constitutional privilege against self-incrimination. Comment by a prosecutor upon an accused's failure to testify constitutes reversible error. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); State v. Miller, 76 N.M. 62, 412 P.2d 240 (1966).

Three of the claimed improper comments were made during the giving of testimony by defendant's wife. She was testifying as to the possible sources of some of the articles sold by defendant. The prosecutor objected to the testimony on the grounds that she was not on trial and what she may have done was immaterial. This prompted a remark by defendant's attorney to the effect that the State had adduced a lot of evidence which was irrelevant and immaterial concerning sales by defendant. The court sustained the objection, and defendant then announced he would like to make an offer of proof. The court stated the offer could be made later, so defendant's attorney continued to question the witness.

The District Attorney next objected to a question on the ground that it was asking for the same thing to which objection had been sustained. Defendant's counsel disagreed, and the prosecutor again stated the substance of his objection in the following language:

> "We are not concerned with what she does. We are concerned with what the defendant does and she is not the defendant. She cannot come in here and explain away the case on behalf of the defendant."

The court permitted defendant's attorney to ask the question and the examination of the witness continued.

After a few more questions the witness was asked to explain where ". . . all of these items brought into evidence came from." She stated she could explain where they came from, and the prosecutor objected that she was ". . . not the Witness to do the explaining."

The court called a short recess and then the trial resumed.

Although the statements of the prosecutor in making his objections may possibly be construed as suggesting that it was for the defendant to take the stand and make the explanations, we are of the opinion that considering the time and the manner in which the statements came into the case they could not reasonably be construed as comments to the jury on defendant's failure to take the stand and testify on his own behalf.

In his closing argument the prosecutor made a reference to an effort to get defendant's case in through Mrs. Lindsey, but he continued his comments by referring to other people, and particularly to servicemen, from whom Mrs. Lindsey testified many of the articles were secured. The prosecutor's argument related to the fact that none of these people were produced as support for the testimony of Mrs. Lindsey.

The prosecutor, in his argument, also referred to defendant as sitting ". . . here like the silver fox . . ." and looking ". . . like a Presbyterian minister . . ." We are not sure just what these references were supposed to suggest, but we are unable to construe them as comments on defendant's failure to testify on his own behalf.

Defendant concedes nothing said constituted a direct comment on his failure to take the stand, but he argues what was said amounted to the same ". . . for all practical purposes." We are of the opinion that defendant is urging

BLEED THROUGH, POOR COPY

a strained construction of the remarks and arguments. The trial court, who was in a far more favorable position than we to judge the propriety of the remarks and arguments, denied the motions for a mistrial, and we are not inclined under the circumstances to question its judgment. See People v. Hardy, 271 Cal.App. 378, 76 Cal.Rptr. 557 (1969); State v. Anaya, 79 N.M. 43, 439 P.2d 561 (Ct. App. 1968).

The remarks and arguments we are here considering are not comparable to the remarks of the Assistant District Attorney in People v. Armstrong, 31 App.Div.2d 447, 298 N.Y.S.2d 630 (1969). The defendant in the case now before us was not the only one who could have explained and accounted for defendant's possession of the many articles he sold, if in fact an honest exculpatory explanation thereof could be made. As already stated, Mrs. Lindsey testified the articles were procured from many persons and sources. However, none of these persons or any other evidence of legitimate purchases were produced to corroborate her testimony.

The next claimed error was that of permitting an undercover police officer to testify defendant had told the officer the articles he was selling at his place of employment were stolen.

In support of this contention defendant reiterates his arguments under his claim of error in the admission of evidence of other stolen property. This claim of error is discussed above and is rejected.

However, defendant also urges that the testimony of the officer was inadmissible under the holdings in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966) and Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). His position is that the investigation had focused on him when the officer

went to work in an undercover capacity at defendant's place of employment for the purpose of observing defendant's activities, and, therefore, the officer was obliged to give defendant warning of his constitutional rights before asking him any questions. Defendant admits he had not been taken into custody, and he does not contend he was in any way deprived of his freedom of action. He does contend the investigation had so focuesd upon him that he was protected by the Miranda and Escobedo decisions from interrogation without first being advised of his constitutional rights.

He must fail in this contention because whatever questions were asked of him by the police officer could not have amounted to "custodial interrogation." In the Miranda decision, "custodial interrogation" is defined as ". . . questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. . . ." The court in Footnote 4 said: "This is what we meant in Escobedo when we spoke of an investigation which had focused on an accused."

The position here taken by defendant is similar to the position taken and rejected in Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966).

Defendant's final point is that the trial court erred in refusing his motion to suppress evidence of prior criminal convictions. He claims the court erred in two particulars: (1) in failing to properly exercise its discretion in ruling on the admissibility of defendant's prior convictions, and (2) in failing to suppress evidence of the convictions.

As to defendant's claim that the trial court failed to properly exercise its discretion in ruling on the admissibility of evidence as to his prior convictions, he relies upon State v. Waller, 80 N.M. ....., 456 P.2d 213 (Ct. App. 1969)

and State v. Coca, 80 N.M. 95, 451 P.2d 999 (Ct. App. 1969). Nothing stated in those cases is applicable here.

In the Coca case it was said the record did not disclose the exercise by the trial court of its affirmative duty to exercise its discretion. This is not the case here. Defendant moved to suppress evidence of his prior criminal convictions on the grounds they were remote in time and not of the same nature as the offense charged. Although it is not clear what the trial court looked at pertaining to these prior convictions, it asked to ". . . see what they are." The court then announced the State was entitled to use the information as to the prior convictions for the purpose of impeachment.

Defendant did not testify, so we have no way of knowing the number or nature of the prior convictions or the dates thereof. It is clear, however, that the trial court did rule on the motion and did exercise its discretion.

In the Waller case it was said ". . . the trial court failed to properly perform its affirmative duty of weighing the legitimate probative value of the cross-examination against the illegitimate tendency to prejudice. . . . " in that it permitted ". . . questioning concerning '[a]ny unlawful act,' . . ." This is entirely different from the ruling of the trial court in the present case. It is true, as above stated, the record before us fails to reflect the nature, number or dates of the prior convictions, but the record does show the only matters considered were "prior convictions." We cannot speculate as to the nature, number or dates of these prior convictions, but we can say the record fails to support any claim the trial court held that evidence of "any unlawful act" was admissible.

Defendant's contention, that the trial court erred in failing to suppress evidence of prior convictions, is predi-

cated upon his claim that the court, by refusing to sustain his motion to suppress evidence as to his prior convictions, placed him in an unfair dilemma, in that he was required to forego his right to testify and explain away the charge against him, or take the stand and subject himself to cross-examination concerning his prior convictions. He urges that § 20-2-3, N.M.S.A. 1953, which permits the examination of a witness as to prior convictions, is unconstitutional in that it deprives an accused of due process, guaranteed by the Fifth and Fourteenth Amendments, and of trial by an impartial jury, guaranteed by the Sixth Amendment. He relies particularly upon the following language from United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968):

> "It is no answer to urge, as does the Government, that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. . . ."

In the Jackson case the question involved was that of the constitutionality of a provision in the Federal Kidnapping Act, 18 U.S.C., § 1201(a), which provided for punishment by death ". . . if the verdict of the jury shall so recommend." The Supreme Court held this provision unconstitutional in that its ". . . inevitable effect . . . is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. . . ."

The result in that case has no bearing on the question now before us.

BLEED THROUGH POOR COPY

We concede an accused may hesitate to take the witness stand if his past criminal record is such that his credibility will probably be completely destroyed in the eyes of the jury if this record is made known to the jury. However, this in no way impairs his right against self-incrimination, his right not to be deprived of his life, liberty or property without due process of law, nor his right to a public trial by an impartial jury.

When an accused takes the witness stand he is in the same position as any other witness. Section 22-2-3, supra. He is not entitled to have his testimony falsely cloaked with reliability by having his credibility protected against the truth-searching process of cross-examination. To extend defendant's reasoning to its logical conclusion would be to exempt an accused from all attacks on his credibility. Certainly any attack on an accused's credibility by a searching cross-examination may have some deterring effect upon his willingness to waive his right against self-incrimination and to take the witness stand.

If the jury is to be fair and impartial, and if it is to accomplish its purpose of arriving at the truth, then it is entitled to consider all legitimate evidence bearing upon the issues and upon the credibility of all witnesses testifying on these issues.

Pursuant to the provisions of § 22-2-3, supra, our Supreme Court has repeatedly held that on cross-examination the State may establish through the accused the fact of his prior conviction and the name of the particular felony or misdemeanor of which he has been convicted. State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966). This view is in accord with the generally accepted rule concerning the right to test a witness' credibility by making inquiry as to prior convictions. Smith v. United States, 358 F.2d 683 (3d Cir. 1966); State v. Simmons, 148 W.Va. 340,

135 S.E.2d 252 (1964); 4 Wigmore, Evidence § 1270 (3d Ed. 1940); McCormick, Evidence § 43 (1954); 1 Herrick, Underhill's Criminal Evidence, supra, § 164.

The judgment of conviction should be affirmed.

IT IS SO ORDERED.

s/ LaFel E. Oman
Judge

WE CONCUR:

s/ Waldo Spiess C.J.
s/ Joe W. Wood J.